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June 23, 2017

ELECTRONIC FILING

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary AB T2R 0A8

Dear Sirs/Mesdames:

Re: Energy East Pipeline Ltd and TransCanada Pipelines Limited | Enhanced Indigenous and Public Engagement

We write to the National Energy Board ("NEB") on behalf of our clients, Aroland First Nation, Ginoogaming First Nation, Constance Lake First Nation, Wahgoshig First Nation and Biigtigong Nishnaabeg, further to our recent correspondence relating to the NEB's Enhanced Indigenous Engagement Process being applied to the Energy East and Eastern Mainline applications ("the Energy East projects").

Each of our clients are holders of inherent and treaty rights, with reserve land and traditional territory in the immediate vicinity of or overlapping the Energy East projects. Each will be directly and indirectly impacted by the Energy East projects, and the traditional way of life practiced by their members for millennia will suffer. As a result of these factors, they have been granted standing as intervenors in the NEB approval process.

For many years, our clients and other First Nations across Canada have raised serious concerns about the manner in which the NEB addressed (or failed to address) the needs of First Nations. The NEB has recently appointed a panel pursuant to section 15 of the NEB Act to "assist in carrying out additional engagement activities beyond the Hearing Panel's activities" with aboriginal parties.[1] This so-called "Enhanced Indigenous and Public Engagement" ("EIPE") will only result in a report, which the Board has no obligation to follow. The Board Members participating in the EIPE do not have decision making authority with respect to the Energy East or Eastern Mainline Projects.[2]

[1] Email from Laurel Sherret to Corey Shefman, June 5, 2017
[2] *Ibid*.

Following our review of the extremely limited publicly available materials relating to the EIPE, including correspondence with NEB counsel, our deep concern is that the EIPE creates the perception of enhanced engagement, but does not in fact actually improve or enhance the NEB's engagement with First Nations. It looks like window dressing. We reach this conclusion because, inter alia;

- No process funding is available to assist First Nations to participate meaningfully in the EIPE process, despite the obvious disparity in resources between the proponent and First Nations. Expecting First Nations to participate meaningfully without providing the resources for them to do so, devalues their contributions and is indicative of a lack of respect for their knowledge.

  The fact that Board Members may be made available to meet with First Nation stakeholders in person does nothing to remedy the inequity inherent in forcing First Nations to attend and participate without funding for technical experts, legal counsel, honoraria for elders and resource users, and all of the other reasonable expenses which are incurred when conducting meaningful consultations.

  This failure to provide funding (coupled with the delay in approving funding requests for the actual intervention in the regulatory proceedings) causes real prejudice to the First Nations. No meaningful engagement (let alone 'enhanced engagement') can take place without proper funding.

- The terms of reference for the EIPE process have not been published and the NEB has failed to provide the terms of reference when specific requests for them have been made. As a professional regulatory tribunal with the powers of a court, procedural fairness requires a level of formality in the NEB's proceedings which have not been demonstrated here. Participants must be able to understand and respond to the issues raised in a proceeding.

  While the NEB may characterize this process as preliminary and outside the regulatory decision making role of the NEB, we note that s.15, under which the EIPE members are acting, provides those members with "… all the powers of the Board…" and thus the procedural fairness which participants are entitled to expect must resemble that of a court.

  Meeting its obligations in that regard will require that the NEB provide detailed information, including but not limited to terms of reference, relating to the mandate, scope and objective of the EIPE process.

- Related to the lack of terms of reference, and comments made by NEB staff, it is our view that the apparently intended informality of the process, is in fact indicative of the NEB's haphazard, disorganized and apathetic attitude towards engagement with First Nations generally. The result of the casual manner with which the NEB has approached this process is that First Nations are unable to effectively prepare for meaningful engagement or raise their concerns in a

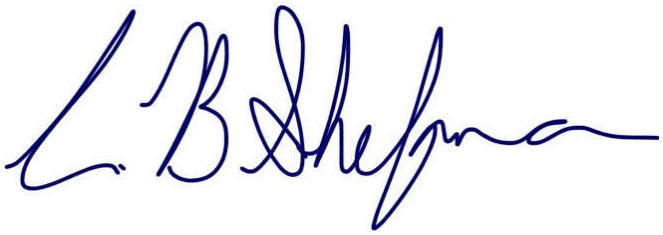
systematic and effective manner. The result of these facts is that like so much of the engagement conducted by proponents, the proposed process will amount to little more than a record-building exercise, rather than the deep and meaningful consultation which is required.

- Similarly, the expectation of the NEB that these consultations and engagement, or even consultations on the design of future engagement, will conclude by the end of summer 2017, presupposes the outcome. Even allowing for further comment afterwards, such a restrictive timeline prevents the First Nations from gathering the necessary data from its members and resource users and consulting with its members. As governments in their own right, the First Nations have duties to their members which cannot be met in the time frames set out by the NEB. As noted by Grand Council Treaty 3 in its filing A84321-1, "…it is difficult to provide meaningful feedback on a process at the same time that it is being developed…."

Despite the foregoing, our clients feel compelled to participate in all aspects of the NEB's consideration of the Energy East projects, including the EIPE. The Energy East projects will unquestionably have serious, long-term impacts on the territories of the First Nations, and the traditional use of resources by their members. But the First Nations have been backed into a corner, compelled to accept, effectively under duress, the lesser of evils – participate in a seriously flawed process, or do not participate at all and risk being found to have waived rights to consultation and accommodation. This is not real choice.

Notwithstanding that no funding has yet been offered for their participation, we ask that the NEB allocate reasonable funding to facilitate their meaningful participation.

Yours truly,



Corey Shefman

CS/md